

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2207

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee;

-against-

DAVID ROSS MILEY,

Defendant-Appellant.

-----X

PRIEF FOR DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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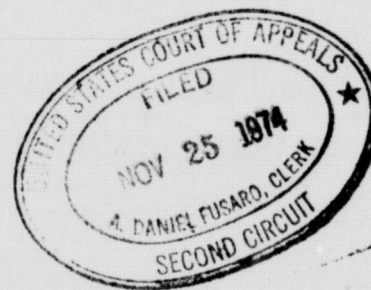


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UNITED STATES OF AMERICA,

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-against-

DAVID ROSS MILEY,

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

Miley appeals from a judgment of conviction after trial by jury, of conspiring to violate 21 U.S.C. 812, 841 (a)(1) and 841 (b)(1)(B). The conspiracy count in the indictment charged David Ross Miley with conspiring to possess and distribute Schedule 1 and 11 controlled substances. Substantive counts 4 and 6 charged Miley with sales of Schedule 1 controlled substances. Milton J. Pollack was the trial judge. Miley was sentenced to two months to run concurrently, followed by two years special parole.

QUESTION PRESENTED

Did the Government as a matter of law, prove the existence of multiple conspiracies rather than a single conspiracy, thus requiring dismissal of the instant indictment.

STATEMENT OF FACTS

This is an appeal from a retrial. At the earlier trial which ended May 8, 1974, the jury did not agree on a verdict but acquitt-

ed Miley, one of five defendants, on Count 2, and convicted one of the other defendants, Wenzler, on Count 5. In the second trial begun June 17, 1974 and ended June 21, 1974, the jury convicted all five defendants on the remaining counts.

THE TRIAL TESTIMONY

Michael Starbuck, a marketing research supervisor, said he met William Brandt on November 3, 1973 to discuss purchase of LSD and marijuana (35). That he knew Brandt as he conspired with him about 1½ to 2 years previously to import cocaine to the United States. Starbuck financed this operation with his own money about \$5000.00 or \$7000.00, according to the testimony. When Starbuck testified in this trial, he was about to enter a guilty plea in the prior cocaine conspiracy matter (36-37).

On November 11, 1973, Starbuck met Brandt at the Village Plaza Hotel to talk about buying marijuana and LSD (33,35-37).

On November 26, 1973, Starbuck advised Agent Palombo that 1000 units of LSD could be bought from Brandt for \$600.00 (42). Starbuck then went with Agent Nieves to the Village Plaza Hotel where Nieves was introduced to Brandt, Godinsky and Miley (42).

On November 23, 1973, just before the prior incident, Starbuck met Brandt to negotiate an LSD deal (39-40), and Starbuck got a sample (41).

On November 27, 1973, Starbuck, Brandt, Godinsky and Miley met Agent Nieves in Brandt's room at a Village hotel (42). Nieves got some LSD from Godinsky and Nieves gave Brandt \$650.00. Brandt gave some of that money to Godinsky. Nieves and Brandt then spoke about a buy of liquid LSD (43). Nieves did not recall Miley saying

Or doing anything at that meeting (44).

On December 5, Starbuck met Brandt and Lang at latter's apartment to arrange a buy of one ounce of THC for \$1800.00 (44). Lang gave Starbuck a sample of THC and said a sale would have to be arranged later (45).

On December 13, 1973, Starbuck and Brandt drove with Nieves and Palombo to Flores' apartment. The said agents waited in their car while Starbuck and Brandt went up to the apartment and met Varvarigos. Brandt told Flores customers were downstairs who would not front money until they saw the drug, THC.(46).

Varvarigos allowed one customer to come up. Starbuck went down and brought up Nieves (47). Nieves weighed the THC and paid \$1800.00 to Brandt who then gave Flores some money. Flores and Varvarigos discussed with agent how to cut the THC and Varvarigos instructed Nieves to use lactose (48).

On January 4, 1974, Starbuck met Brandt at the latter's Hotel in the Village. They then went to Lang about buying LSD (51).

On January 15, 1974, Starbuck and Brandt met with Lang, Nieves and Palombo (54). Starbuck and Brandt waited at Brandt's comic book store and Palombo and Nieves went with Lang to the latter's contact who was to provide the LSD. After making the buy, Nieves and Palombo returned to Brandt's book store and gave him a commission of \$200. (55).

On November 27, 1973, Nieves testified that Starbuck came to their office to advise Nieves and Palombo that he arranged to buy LSD from Brandt that evening (181-2).

Starbuck then gave Nieves and Palombo a sample LSD he got from Brandt (182). Nieves and Starbuck then met Brandt, Miley and Godinsky at Brandt's hotel room (184-5). Brandt said Godinsky was the supplier of the LSD (186). Nieves gave Brandt \$650.00 and Brandt gave \$180.00 to Godinsky. Nieves asked Brandt about bigger quantities (187) which was discussed after Godinsky left (188). Brandt also said THC at \$1800.00 an ounce could be bought (188).

On December 13, 1973, Nieves, Palombo and Starbuck met Brandt at his hotel, drove to Flores's apartment to buy an ounce of the THC (192-3). Brandt and Starbuck went up first. Then 15 minutes later, Starbuck came down and brought Nieves up. Nieves then left \$1800.00 with Palombo in the government car and Starbuck and Nieves returned to Flores' apartment (194).

Brandt introduced Nieves to Flores and Varvarigos and pointed to the drug on a balance. Nieves weighted the drugs on his own scale, went downstairs for the \$1800.00, returned and gave the money to Brandt (195-7).

Varvarigos then advised Nieves to cut the drug with lactose and sell it in capsules (198). Nieves saw Brandt give Flores some money and he then said, "twelve, right". Flores agreed. Nieves and Starbuck then left the apartment (199). The drug Nieves got was not THC but PCP, a Schedule III drug (200).

On January 3, 1974, Nieves called Brandt about buying some LSD. Brandt had about 3850 dots at .05 each. That night, Nieves and Palombo went to Brandt's hotel and met Brandt, Godinsky and Miley (204). Godinsky produced 1350 dots and Brandt said he's have

the balance in an hour. Nieves and Palombo paid for half and left, returning about an hour later for the balance. Only Miley was in at the time (205). Then Brandt and Godinsky came back and completed the deal (206).

On January 8, 1974, Palombo and Nieves met Varvarigos at his apartment to buy a pound of cocaine for \$16,000.00 (207), but after awhile, the deal did not go through (209-10).

On January 19, 1974, the agents again went to Varvarigos's place to buy cocaine but to no avail. He gave the agents a sample THC and said it was better than what they had gotten on December 13, 1973 (211).

On January 15, 1974, Starbuck got a sample LSD called "purple haze" which he gave to Nieves. Starbuck said he arranged to buy 4000 tablets of this LSD from Brandt that afternoon (213-14). Starbuck and the agents then met Brandt at his store with Lang. The agents went with Lang to meet his connection and to pay Brandt later at the book store his commission of \$180.00 or \$200.00 (215).

Said agents went with Lang to East 9th Street apartment and were introduced by Lang to a person called Joe, later known to be Wenzler (216), who agreed to give the agents 2000 tablets at that time. Wenzler left the apartment and returned with the first delivery of 2000 tablets for which Palombo gave him \$600.00. Wenzler again left and came back with another 2000 tablets for which he was paid. The agents then left (217) for Brandt's book store where Brandt got \$200.00 from them and they met Starbuck and Miley (219).

On February 6, 1974 the agents met Brandt and ordered 50000 dots of LSD for \$16000.00. Brandt told them that his connection, Strider, would not meet anyone until the day of the deal and he would let them know when the drug came (220). The agents said they needed 24 hours to get the money (221).

On February 12, 1974, the agents met Miley and Brandt at the comic book store about the 50000 dot deal (221). Strider, the connection hadn't shown up (224) so Miley was sent by Brandt to find him. Strider was Robin Bachia (226). Strider arrived minutes later and the agents bought 1800 dots of LSD for \$660.00 (227). Bachia wanted to money fronted before he would go along with the larger deal. He went with the agents to their car to see the money. All three then drove to Strider's connection (228). Strider got out of the car, came back a few minutes later with 10000 dots of LSD and said that was all he could then get. He was then put under arrest (229).

He was advised of his rights and agreed to co-operate and took the agents to Goldstein's apartment at 56 E 4 Street, where Goldstein was arrested and with his consent, his apartment was searched and 4000 dots of LSD and \$660.00 government funds were found (230). Then these agents arrested Brandt, Wenzler and Miley (236-7).

When cross-examined, Nieves said that he had no evidence that any other than Brandt, Miley, Bachia, Goldstein and Wenzler, knew about or agreed to or gained from said sales (351-4).

Palombo's direct testimony was similar to Nieves (356) and it was also similar to the cross-examination (497-500).

After the Court's charge, the jury twice asked instructions on conspiracy (756, 760). It also asked about "David Ross Miley involvement, driving to Varvarigos's apartment" and his actions on about December 12, 1973 involvement. (756).

At the conclusion of the trial, David Ross Miley was found guilty as charged (766-7).

ARGUMENT

1

MULTIPLE CONSPIRACIES WERE ESTABLISHED, THERE WAS NO FAIR PREPONDERANCE OF NONHEARSAY EVIDENCE OR EVIDENCE PROVING BEYOND A REASONABLE DOUBT THAT A SINGLE CONSPIRACY EXISTED, THEREFORE THE INDICTMENT AGAINST MILEY SHOULD BE DISMISSED

The Court's charge indicated if the jury found a multiple instead of a single conspiracy, the defendants must be acquitted.

Miley's position on this appeal is that though the question of the existence of a multiple conspiracy is factual and so should be for the jury, this case is so full of conspiracies, that as a matter of law, the charges against Miley must be dismissed.

This is not the familiar "chain conspiracy" case. No division of labor from importing to selling drugs to consumers involved here.

Blumenthal v. U. S. 322 U.S. 539 (1947)
Kotteakos vs U.S. 328 U.S. 750 (1945)
U. S. v. Aviles, 274 F. 2d 817 (2d Cir. 1962)
cert. den. 362 U.S. 974 (1960)
U. S. v. Aqueci, 310 F. 2d 817 (2d Cir. 1962)
U. S. v. Calabro, 449 F. 2d (2d Cir. 1962)
cert. den. 405 U.S. 928

The evidence in this case clearly shows multiple conspiracies, each having its own source of supply, its own customers, its own

base of operations, each having its own core.

Involved for the most part were LSD, THC, PCP and cocaine. All these drugs except cocaine, could be had in some nearly laboratory.

So, basically, there could be no one else involved in importation before getting such drugs.

The activities of some conspirators had nothing to do with the acts of the others.

Each was an entity unto himself, interested only in himself, there was no common working for the common good.

There was no connection with any sale or money from a sale involving Miley, despite the contentions of the agents.

Miley lived in Brandt's one room apartment. He worked in the comic book store, actually for Brandt who paid him off in room and board, so to speak, he did not even have any clothes, and came to court at all times, for all to see, in a dirty, torn suit of clothes.

Though he was sent on errands by Brandt, like to get Godinsky, and though he was in the store and apartment when deals were made, he did not participate in any manner, shape or form, in such deals. Even Starbuck said he did not participate in any deal.

In effect, Miley was found guilty by association, nothing else, and because of Brandt's dealings with the various groups. These facts are insufficient for a single conspiracy. *Kotteakos v. U.S.* 328 U.S. 750 (1945).

The government failed to show any binding, organized plan among the co-conspirators. What was shown were many isolated transactions at different times. No proof was shown of continued

involvement with each other. There was no common thread upon which the jury could find a single conspiracy charged.

United States v. Calabro, 449 F.2d 885 (2d Cir. 1971).

There must be some binding substance among the different parties to justify a finding of a single conspiracy which did not exist in this case.

Therefore, the trial court should have found as a matter of law that a multiple conspiracy existed and should have direct that the indictment against David Ross Miley be dismissed.

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PURSUANT TO FEDERAL RULES OF APPELLATE
PROCEDURE, RULE 28 (1) ALL RELEVANT
ARGUMENTS RAISED IN THE BRIEFS OF OTHER
APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

The judgment of conviction should be reversed and the case dismissed or remanded on the ground that a conspiracy was not proven.

Respectfully submitted,

HARRY FRACTENBERG
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS
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TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that a JOINT APPENDIX HAS BEEN FILED IN THIS
APPEAL BY IRVING COHEN, ESQ., ON BEHALF OF ALL OF THE APPEALING
ATTORNEYS.

Dated: N. Y. November 25, 1974.

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Worth 2-2632